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Colorado General Assembly

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MEMORANDUM

TO: Kevin Neal Patterson II and Eric Leveridge
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: February 7, 2018
SUBJECT: Proposed initiative measure 2017-2018 #133, concerning Policy Changes
Pertaining to State Income Taxes

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

This initiative was submitted with a series of initiatives including proposed initiatives 2017-2018 #133 to #144. The comments and questions raised in this memorandum will not include comments and questions that are addressed in the memoranda for proposed initiatives 2017-2018 #134 to #144, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum. Only new comments and questions are included in this memorandum.

Purposes

The major purposes of the proposed amendment to the Colorado constitution and the Colorado Revised Statutes appear to be:

1. To eliminate the state constitutional requirement that all taxable net income be taxed at one rate;
2. To specify that on and after January 1, 2019, the state income tax rate be increased from 4.63 percent to 11.8 percent for individuals with federal taxable income (FTI) greater than \$500,000;
3. To expand the qualifications for individuals, caregivers, and students to be eligible to receive a Colorado earned income tax credit;
4. To require the Department of Revenue to calculate the net increase in income tax revenue;
5. To specify that the net increase in income tax revenue be used for the refundable Colorado earned income tax credit and to pay the department's reasonable and necessary expenses to administer the Colorado earned income tax credit (EITC);
6. To repeal the existing earned income tax credit; and
7. To specify that the net increase in income tax revenue attributable to the rate change described in purpose no. 2 is not subject to any limitations on general fund appropriations or any other spending limitation in law including section 20 of article X of the constitution.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Pursuant to article V, section 1 (4)(b) of the Colorado constitution, an initiated constitutional amendment must have the approval of at least fifty-five percent of votes cast unless it is limited to repealing, in whole or in part, any provision of the constitution. Pursuant to article V, section 1 (4)(a) of the Colorado con-

stitution, initiated measures that do not amend the constitution require approval of a majority of votes cast. The proposed initiative contains both amendments to the Colorado constitution and the Colorado Revised Statutes.

- a. In light of the conflict between the provisions about the number of votes needed to pass an initiated measure, can an amendment to the Colorado constitution and the Colorado Revised Statutes be included in the same initiated measure?
 - b. Will the entire measure become effective based on exceeding a single threshold of votes?
 - c. What percentage of votes cast is necessary for the enactment of the proposed initiative?
 - d. What is the outcome if the proposed initiative receives the approval of fifty-two percent of the votes cast?
3. What will be the effective date of the proposed initiative?
 4. Almost all of the proposed initiative's references to the federal Internal Revenue Code specify "of 2017". Is it the proponents' intent that the references remain static to the code as it existed in 2017 or would the proponents prefer that the references include future amendments? If the proponents wish for future amendments to be included, would the proponents consider using "internal revenue code" since section 39-22-103 (5.3), C.R.S., defines that as a term to include future amendments?
 5. Proponents' section 39-22-104 (1.7) strikes the requirement that an income tax of 4.63 percent be assessed for tax years commencing on and after January 1, 2000, and before January 1, 2019.
 - a. Is it the proponents' intent that an income tax of 4.63 percent not be assessed for tax year 2018?
 - b. This provision could also have consequences for taxpayers who would otherwise file late or amended income tax returns for 2017 and prior years.
 - c. If the proponents intend that a 4.63 percent tax be assessed for tax year 2018, would the proponents consider retaining the reference to January 1, 2000, and instead specifying an exception to the 4.63 percent tax rate beginning in taxable years commencing on or after January 1,

2019, for federal taxable income in excess of the threshold in subsection (1.8)?

6. Proponents' section 39-22-104 (1.8)(a) specifies that the income tax rate of 11.8 percent is levied on the portion of an individual's FTI that is greater than \$500,000. Is there a different FTI threshold for the different filing status options for taxpayers, e.g., individuals filing married filing jointly, head of household, qualifying widow or widower, or married filing separately?
7. Proponents' section 39-22-104 (1.8)(b) requires that the threshold at which income is subject to the higher tax rate be adjusted annually for inflation. However, 26 U.S.C. sec. 1 (f) ("section 1(f) of the U.S. Internal Revenue Code of 2017") does not define "inflation". Are you referring to the description of the "cost-of-living adjustment" in 26 U.S.C. sec. 1 (f)(3)?
8. Inflation and cost-of-living adjustments included in the Internal Revenue Code attempt to capture national economic conditions. Is it the proponents' intent that the adjustments in the proponents' sections 39-22-104 (1.8)(b) and 39-22-123.3 (10) use national economic indicators rather than those for Colorado?
9. Proponents' section 39-22-123.3 (1) is very specific that the earned income tax credit is a "credit against the tax imposed by section 39-22-104 (1.7)". Is the intent, through this reference, to make sure the EITC is not available for taxpayers with an FTI at or above the threshold set forth in section 39-22-104 (1.8)? That seems unnecessary considering the thresholds set forth in proponents' section 39-22-123.3. Why not say instead, "against the tax imposed under this article 22"?
10. What is the proponents' intent in including "as modified by substituting "age 19" for "age 25" in section 32 (c)(1)(A)(ii)(II)" in proponents' section 39-22-123.3 (1)? Why not add that information to the definition in proponents' section 39-22-123.3 (9)(e) instead? Why does proponents' section 39-22-123.3 have two definitions of "eligible individual"?
11. Does proponents' section 39-22-123.3 (1)(a) mean that an eligible caregiver or an eligible student, regardless of age, is eligible for the Colorado EITC even if the eligible caregiver or eligible student has zero earned income?
 - a. Proponents' section 39-22-123.3 (9)(c) and (9)(f) specify that an eligible caregiver and an eligible student must be full-year residents in the state.

Is it correct that the Colorado EITC for eligible caregivers or eligible students is not available for part-year residents?

12. Is it the proponents' intent in section 39-22-123.3 (1)(b) that the Colorado EITC have a greater number of eligible Colorado taxpayers than the federal EITC because the maximum earned income for Colorado's EITC is greater than the federal maximum earned income?
 - a. If so, does the "maximum earned income" as defined in proponents' section 39-22-123.3 (9)(j) represent the maximum earned income for taxpayers who file single, head of household, or surviving spouse, or does it represent the maximum earned income for taxpayers who file married filing jointly?
 - b. Does it matter that a taxpayer may not claim the federal EITC if the taxpayer's filing status is "married filing separately"?
13. Proponents' section 39-22-123.3 (2) appears to specify the amount of the credit for a taxpayer who has no more than one qualifying child. Is this correct? Would this include individuals with no qualifying children? Please give an example of the calculation for the credit amount and an explanation of the intent for proponents' subsections (2)(i) and (2)(ii).
14. Proponents' section 39-22-123.3 (3) appears to specify the amount of the credit for a taxpayer who has two or more qualifying children. Is this correct? Please give an example of the calculation for the credit amount and an explanation of the intent for proponents' subsections (3)(i) and (3)(ii).
15. What is the amount of the credit for a taxpayer who is an eligible caregiver or an eligible student? Would that be determined based on whether the taxpayer has any qualifying children? If zero or one then the credit is the amount in proponents' section 39-22-123.3 (2)(i), if more than one then the credit is the amount in proponents' section 39-22-123.3 (2)(ii). Is that correct?
16. Proponents' section 39-22-123.3 (4) specifies that the credit in that section is "in addition to any other earned income tax credits provided by law for each taxable year". What other earned income tax credits is this referring to?
17. Proponents' section 39-22-123.3 (5) requires refunds equaling \$240 or more to be refunded to a taxpayer, with accrued interest, on a monthly basis. Would the proponents consider a conforming amendment to section 39-22-622, C.R.S., to allow for this exception?

- a. What is a "separate income tax form for single earned income tax credit payments"?
 - b. Does this provision apply only to single taxpayers?
18. With respect to proponents' section 39-22-123.3 (6), do you mean to say that a taxpayer may not claim a Colorado EITC if the taxpayer is claimed as a qualifying child or a qualifying relative on another person's tax return?
19. Proponents' section 39-22-123.3 (7) requires the Department of Revenue to calculate the net increase in income tax revenue attributable to the increased income tax rate set forth in proponents' section 39-22-104 (1.8). Is that correct? The following questions apply to the same section:
- a. Is it the proponents' intent that the net increase in income tax revenue be set aside to pay for the EITC refunds allowed in section 39-22-123.3? If so, how do the proponents think this set-aside will occur? The net increase in income tax revenue is general fund money, which is not easily earmarked unless transferred to a cash fund. The proposed initiative does not include the creation of such a cash fund. Is that something that the proponents expect the General Assembly to do in implementing legislation?
 - b. What if the net increase in income tax revenue is not sufficient to cover the cost of the EITC refunds allowed in proponents' section 39-22-123.3? Conversely, what happens with any leftover money?
 - c. Is it the proponents' intent that the Colorado EITC be allowed to taxpayers during the same tax year when revenue is received from taxpayers required to pay the higher income tax rate? If so, the state will not know how much revenue will be collected from the higher rate when refundable credits are being issued and administrative expenses are being paid.
 - d. The same section specifies that the net increase in income tax revenue be used to pay the department's reasonable and necessary expenses to administer this section.
 - i. What is the definition of reasonable and necessary expenses?
 - ii. Do the proponents wish to specify how much of the net increase in income tax revenue be used for these purposes? Could the

Department of Revenue use 50 percent of the net increase in income tax revenue for such purposes?

20. The following questions refer to proponents' section 39-22-123.3 (8):
- a. What does "the voter-approved manner of reallocating income tax liability in Colorado" refer to?
 - b. What rules will the Department of Revenue need to adopt in order to implement the "voters' changes to section 8(a) of article X of the constitution"?
 - c. Does "establishing the presumptive means of transmitting the refunds attributable to earned income tax credits to eligible claimants through electronic payments" mean that the Department of Revenue is required to issue refunds electronically?
 - d. Is the Department of Revenue authorized to determine that electronic funds transfers and prepaid debit cards are not viable options?
 - e. What does "appropriate annual notices of forthcoming refunds" mean? Who are the intended recipients of such annual notices?
 - f. Is it the proponents' intent that the Department of Revenue locate eligible taxpayers and notify them of the process of qualifying for the Colorado EITC? If so, how would the Department determine which taxpayers would be eligible?
21. Proponents' section 39-22-123.3 (9)(f) provides the definition of an eligible student. As written, only eligible students who have been awarded a Federal Pell Grant (among other requirements) meet the definition. Is this the proponents' intent?
- a. Please consider changing the reference of "section 1070(a) of the U.S. Education Code of 2017" to "20 U.S.C. sec. 1070a" to align with standard office formatting.
 - b. Do the proponents intend to allow for future amendments to the definition of "Federal Pell Grant" of 20 U.S.C. sec. 1070a to apply to proponents' section 39-22-123.3 (10)(e) if the federal law is amended in the future? If so, please add "as amended" after the citation and remove the reference to "of 2017".

- c. Please consider changing the reference of "section 1087(ss) of the U.S. Education Code of 2017" to "20 U.S.C. sec. 1087ss".
 - d. Do the proponents intend to allow for future amendments of the "simplified application form" of 20 U.S.C. sec.1087ss to apply to proponents' section 39-22-123.3 (10)(e) if the federal law is amended in the future? If so, please add "as amended" after the citation and remove the reference to "of 2017".
22. Proponents' section 39-22-123.3 (9)(a) and (9)(j) require annual inflation adjustments "according to section 1(f) of the U.S. Internal Revenue Code of 2017". However, 26 U.S.C. sec. 1 (f) ("section 1(f) of the U.S. Internal Revenue Code of 2017") does not define "inflation". Are you referring to the description of the "cost-of-living adjustment" in 26 U.S.C. sec. 1 (f)(3)?
23. The following questions refer to proponents' section 39-22-123.3 (13):
- a. Is it the proponents' intent that any net revenue increase resulting from the increased income tax rate set forth in proponents' section 39-22-104 (1.8) be retained and spent regardless of the limitations set forth in section 20 of article X of the state constitution?
 - b. Is this dependent on the requirement in proponents' section 39-22-123.3 (7) that the Department of Revenue calculate the net increase in income tax revenue attributable to the increased income tax rate?
 - c. Why is this section included in the section that creates the new Colorado EITC? It seems, from a drafting perspective, to be better suited as a subsection (c) under proponents' section 39-22-104 (1.8) with a cross reference to the requirement that the Department calculate that amount in proponents' section 39-22-123.3 (7).
24. Current law, section 39-22-123 (6), C.R.S., makes reference to section 39-22-123.5, C.R.S., which is repealed in the proposed initiative. This would appear to reinstate the EITC credit, which is a TABOR refund mechanism, under section 39-22-123, C.R.S. Is that the proponents' intent? If not, please amend section 39-22-123 (6), C.R.S., to conform to your intent.
25. Under current law, section 39-22-627, C.R.S., the state income tax rate is lowered from 4.63 percent to 4.50 percent when the TABOR refund exceeds the state expenditure obligation for the senior homestead property tax exemption and the revenue reduction attributable to lowering the income tax rate. The

following questions concern how this TABOR refund mechanism would be administered under the proposed initiative:

- a. Is it the proponents' intent that the 11.8 percent rate for income in excess of \$500,000 also be lowered to 4.5 percent in years where the TABOR refund is sufficiently large?
 - b. Would the revenue reduction attributable to lowering the income tax rate from 11.8 percent to 4.5 percent be included in the calculation for determining the refund threshold amount that triggers the income tax rate reduction in section 39-22-627, C.R.S.?
26. Under section 1-40-105.5, C.R.S., the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
- a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
 - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Section 1 of the proposed initiative appears to be a non-statutory declaration. There should be a headnote to indicate as such, for example "**SECTION 1. Declaration.** The people of Colorado find that:".

2. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed.
 - a. For accuracy, the amending clause for section 2 of the proposed initiative should read: "In the constitution of the state of Colorado, section 20 of article X, **amend** (8)(a) as follows:".
 - b. Sections 3 and 4 of the proposed initiative impact the same statutory section and could be combined under one amending clause, to read: "In Colorado Revised Statutes, 39-22-104, **amend** (1.7) and (2); and **add** (1.8) as follows:". If combined, the first line of page 2 can be deleted and the remaining sections can be renumbered.
3. Each section in the Colorado constitution and the Colorado Revised Statutes has a headnote. Headnotes briefly describe the content of the section. A headnote should be added to Section 2 of the proposed initiative and all headnotes should be in bold-face type.
4. It is standard drafting practice to:
 - a. Spell out all numbers and dollar amounts, for example "\$500,000" is "FIVE HUNDRED THOUSAND DOLLARS";
 - b. Include gender neutral language, for example "HIS OR HER DESIGNEE";
 - c. Use commas to set off parenthetical phrases;
 - d. Refer in statute to the Colorado Constitution as the "state constitution";
 - e. Capitalize the first letter of the first word of each entry of an enumeration paragraphed after a colon.
5. Did the proponents mean to reference the state constitution in proposed section 39-22-123.3 (8) as "section 20 (8)(a) of article X of the state constitution"?
6. When repealing a statutory section, the section number and headnote are not required to be stricken.
7. For purposes of this initiative, the word "shall" is defined in section 2-4-401 (13.7), C.R.S., to mean "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), C.R.S., "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty."